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Supreme Court of the United States

OCTOBER TERM, 1931

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF MINNESOTA

AND

BRIEF IN SUPPORT THEREOF

SUPPLEMENTAL APPENDIX TO THE BRIEF

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SUPPLEMENTAL APPENDIX TO BRIEF FOR PETITIONER

After the preparation and printing of the Petition for Writ of Certiorari herein, and too late to be included therein before filing, opinions were filed by the courts of last resort, of the states hereafter named, on which petitioner relies as supporting his contentions herein. These opinions are available to the court, as hereinafter tated. The opinion of the Court of Appeals of the state of New York not having been published, is printed in full.

APPENDIX U.

MISSOURI.

January 4, 1932.

State ex rel. John J. Carroll, et al., v. Hon. Charles U. Becker, Secretary of State of the State of Missouri.

45 S. W. (2nd) 533, published in advance sheets of the Southwestern Reporter for March 1st, 1932.

APPENDIX V.

Illinois.

January 13, 1932.

Frank T. Moran, et al., v. William Bowley as County Clerk of Boone County and William J. Stratton as Secretary of State of Illinois.

179 N. E. 526, published in advance sheets of the Northeastern Reporter for March 2nd, 1932.

APPENDIX W.

New York.

February 9, 1932.

In the Matter of the Application of Samuel S. Koenig, John J. Knewit and William L. Ward for a Mandamus Order, Peitioners-Appellants, against Edward J. Flynn, Secretary of State of the State of New York, Respondent, and James A. Farley, Chairman of the State Democratic Committee, Intervenor-Respondent.

Appeal from an order of the Appellate Division, Third Department, affirming an order of the Special Term denying an application for a mandamus order.

Abraham S. Gilbert and Benjamin L. Fairchild for the appellants,

John J. Bennett, Jr., Attorney General (Henry Epstein, First Assistant Attorney General, of counsel),

John Godfrey Saxe, for the intervenor.

Crane, J.

Following the census of 1910, Congress enacted the Thirteenth Apportionment Act, in August of 1911 (Vol. 37, U. S. Statutes at Large 13, Chap. 5). It reads in part as follows:

> "That after the third day of March, 1913, the House of Representatives shall be composed of four hundred and thirty-three members to be apportioned among the several states as follows: * * * New York, forty-three.
>
> "§3. That in each state entitled under this apportionment to more than one representative, the representatives to the sixty-third, and each subsequent, Congress, shall be elected by districts composed of a contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants. The said districts shall be equal to the number of representatives to which such state may be entitled in Congress, no district electing more than one representative.
>
> "§4. That in case of an increase in the number of representatives in any state under this apportionment, such additional representative or representatives shall be elected by the state at large and the other representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this act; and if there be no change in the number of representatives from a state, the representatives thereof shall be elected from the districts now prescribed by law until such state shall be redistricted as herein prescribed."

Thereafter, and in accordance with this act of Congress, New York State passed an act known as Chapter 890 of the Laws of 1911, which became a law on October 18, 1911, with the approval of the Governor. It read: "For the election of representatives the state shall be divided into forty-three districts, namely, * * *." The districts were then described, and it wound up by stating that all acts inconsistent with this law were repealed.

Thus the matter stood. Representatives were elected in this state from the Congressional Districts described in this state law of 1911, up to and until the present time. Another census was taken, pursuant to an act of Congress, passed June 18, 1929. This act not only provided for the taking of the census, but also provided for the increase or decrease in state representation according to the results of the census. The total number of representatives was not to be increased (46 U. S. Stat. at Large, Chap. 28, June 18, 1929). That part of the act providing for the apportionment of representatives is also to be found in *Mason's Code,* Vol. 5, No. 3, October 8, 1929 (p. 20). Section 22 (a) reads as follows:

> "On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each state, including Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of representatives to which each state would be entitled under an opportionment of the then existing number of representatives made in each of the following manners: (The rule is then stated) * * *.

"(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning representatives among the several states, then each state shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this act or subsequent statute, to the number of representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the clerk of the last House of Representatives forthwith to send to the executive of each state a certificate of the number of representatives to which such state is entitled under this section. * * *"

This much of the act of June 18, 1929, I have quoted, in order to show that it provided for the apportionment of four hundred and thirty-three representatives among the various states according to population as indicated by the census, but in no way indicated how the number of representatives allotted to each state should be chosen. The previous Apportionment Act of August 8, 1911, in Sections three and four, above quoted, made such a direction, but it is lacking in the later act of June 18, 1929. Upon the certificate of the President to Congress, followed by the certificate of the clerk of the House, all in accordance with the provisions of the census and Apportionment Act of June 18, 1929, New York became entitled to forty-five representatives instead of the forty-three apportioned to it under the act of 1911. This was an increase of two. How are the two to be elected?

The New York Legislature determined that it could be done by a joint resolution, and on April 10, 1931, divided the state into forty-five Congressional Districts

in this manner. The concurrent resolution not being a law was, of course, not submitted to the Governor for his approval, pursuant to the Constitution of this state. This method of electing congressmen is here challenged on two grounds: first, because the Legislature must redistrict the state by a duly enacted law, and not by resolution; and second, if this be not so, the act of Congress, August 8, 1911, is still in force and effect.

The Constitution of the United States, Article I, Section 4, provides: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

By the Constitution of the state of New York, Article III, Section 1, the legislative power of the state is vested in the Senate and Assembly. The lawmaking power, however, includes control or supervision by the Governor in so far as it is provided by Article IV of the Constitution, Section 9, that:

> "Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to

that house, it shall become a law notwithstanding the objections of the Governor."

When this government began to function under the Constitution adopted in 1787-1789, the then existing states apparently understood Section 4, Article I, of the Federal Constitution to refer to the law-making power of the Legislature or to such bodies as the individual states had created for the enactment of laws. The uninterrupted practice in all of the states has been to create Congressional Districts by laws enacted in accordance with the Constitution of the respective states, whatever that may be. While the plain and direct provisions of a Constitution cannot be modified or amended by practice, custom or violation, no matter how long continued, such uniformity by all the states in the method of electing Congressmen indicates quite clearly the meaning which was given to Section 4 of Article I, especially in the early days when the people were so sensitive to intrusion and control by individual executives. A uniform course of action involving the right to the exercise of an important power by the state government without question is no unsatisfactory evidence that the power is rightfully exercised. *Briscoe v. Bank of Kentucky* (36 U. S. 256); *McPherson v. Blacker* (146 U. S. 1, pp. 36, 37); *U. S. v. Sprague* (282 U. S. 716); *Wendell v. Lavin* (246 N. Y. 116); *People v. Tremaine* (252 N. Y. 27).

The wording of Section 4, Article I, very likely suggested that the action by the State Legislature under it should be in the form of a law. It was to be more than an assent by the people of the state to some federal proposition and more than a choice by them of a federal representative. The legislative act was to be a direction to the people of the state demanding cer-

tain things to be done, fixing a time, a place and a manner which had to be followed. From the Legislature was to come a mandate, the disobedience of which would result in penalties or legal consequences. Naturally, this would be effected in the same way as all other like mandates. The action of the Legislature would therefore be in the form of a law. Section 4 says that the times, places and manner shall be "prescribed" by the Legislature. "Prescribed" means to lay down authoritatively a rule of action. From time immemorial this has been done by a law according to the forms existing at the time. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Such a direction must take the form of law. Likewise, in Section 4, we find that Congress may exercise the power given to the State Legislature, and when it makes its regulations, it shall do so "by law." The matter being dealt with in Section 4 is the time, place and manner of holding elections for representatives. Whether these details be fixed by the Legislature of the state or by Congress, they are to be fixed by law. If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it the same way. This, at least, has been the interpretation given to this section for over one hundred and forty years, and it is too late now to overturn it.

There is a distinction to be drawn between the functions of a Legislature; such, for instance, as choosing Senators, making applications to the Federal Government for protection against invasion, ratifying a Constitutional amendment, consenting to a purchase of state lands—there is, I say, a difference between those functions of the Legislature and the prescribing or enacting

of a rule or direction, which must be followed and obeyed by the people of the state, called the law-making power; such, for instance, as dividing the state into Congressional Districts and directing the people where, when and how to vote. We find such a distinction referred to in *McPherson v. Blacker* (146 U. S. 1); *Davis v. Ohio* (241 U. S. 565); *Hawke v. Smith* (253 U. S. 221); *U. S. v. Sprague* (282 U. S. 716), alhough these cases did not pass upon the point here in question. See also *Matter of Doyle* (257 N. Y. 244). We conclude, therefore, that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the state is null and void.

Even if this were not so, we would be inclined to hold that the act of Congress, August 6, 1911, was still in force and effect as a regulation to be followed in providing for the election of an additional number of representatives. Section 3 of that act certainly is a general provision which practically can apply to any increase or decrease in the number of representatives. Section 4, while in terms limited to the apportionment under the act of 1911, also provides and enacts a general rule which may be adapted to subsequent changes in the number of representatives, the rule being that additional representatives are to be elected at large and the others according to existing laws. This is simple, direct and universal. The act of June 18, 1929, did not touch these matters, made no reference whatever to the provisions enacted in Sections 3 and 4 of the Laws of 1911. The number of representatives in any given state were automatically readjusted upon the certificate of the President after each census. This was the only thing accomplished by the act of June 18, 1929. We do not

think that Congress intended to repeal the act of 1911 or thought that it would terminate upon the passage of the subsequent act. The two should be read together, if possible. One provided for the mehod of election and the other merely for the number of representatives. The two can be read together as a fair and reasonable regulation by Congress for the election of its representatives, and this is the view we shall take of it.

Even if we were to take a different view, however, our conclusion would be that by the act of 1911 and the similar acts that preceded it, there had been a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be adhered to even if the statute does not govern *ex proprio vigore*.

With this expression of our opinion, we hold that the resolution of April 10, 1931, is without force; that forty-three of the forty-five Congressmen are to be elected according to the districts created by Chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire state. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the state into forty-five Congressional Districts. The order below is affirmed, without costs.

APPENDIX X.

There is also herewith submitted for the use of the court the following citations of authority supporting the propositions below stated:

1. Certain functions of state legislatures require the exercise of legislative powers:

John P. King M. Co. v. City Council of Augusta (1928), 277 U. S. 100; 48 Sup. Ct. 489 (490); 72 L. Ed. 801.

2. The ratification of amendments to the Federal Constitution calls for an exercise by the legislature of representative rather than legislative functions; such power is controlled, exclusively, by federal law and can not be varied by the states or the people thereof, or subjected to local referendum:

National Prohibition Cases (1920), 253 U. S. 350; 40 Sup. Ct. 486 (488); 64 L. Ed. 946.

Leser v. Garnett (1922), 258 U. S. 130; 42 Sup. Ct. 217 (218); 66 L. Ed. 505.

United States v. Sprague (1931), 282 U. S. 716; 51 Sup. Ct. 220 (222); 75 L. Ed. 640.

3. Political rights are protected by the Federal Constitution and laws, and in particular the right to vote for a federal officer is so protected; the abridgment or denial thereof, in any manner, is prohibited to the states, and a citizen of the United States may invoke the aid of the courts in asserting such rights:

Giles v. Harris (1903), 189 U. S. 475; 23 Sup. Ct. 639; 47 L. Ed. 909.

Wiley v. Sinkler (1900), 179 U. S. 58; 21 Sup. Ct. 17; 45 L. Ed. 84.

Ex Parte Yarborough (1884), 110 U. S. 651; 4 Sup. Ct. 152; 28 L. Ed. 274.

Baldwin v. Franks (1886), 120 U. S. 678; 7 Sup. Ct. 656 (763); 30 L. Ed. 766.

Logan v. The United States (1892), 144 U. S. 263; 12 Sup. Ct. 617 (625-626); 36 L. Ed. 429.

In Re Quarles (1895), 158 U. S. 532; 15 Sup. Ct. 959 (960); 39 L. Ed. 1080.

Ex Parte Young (1908), 209 U. S. 123; 28 Sup. Ct. 441 (447); 52 L. Ed. 714.

United States v. Mosely (1915), 238 U. S. 383; 35 Sup. Ct. 904 (908); 59 L. Ed. 355.

4. The states may, however require lawful conditions precedent, *e. g.*, registration of voters:

Mason v. Missouri (1900), 179 U. S. 328; 21 Sup. Ct. 125 (127); 45 L. Ed. 214.

Pope v. Williams (1904), 193 U. S. 621; 24 Sup. Ct. 573; 48 L. Ed. 817.

5. The equal protection and due process clauses of the 14th Amendment prohibit arbitrary classification or discrimination which abridge or deny any of the rights, privileges or immunities conferred or protected by the Federal Constitution and laws:

Cases cited under paragraph 3, *supra*.

Meyer v. Nebraska (1923), 262 U. S. 390 (400); 42 Sup. Ct. 625; 67 L. Ed. 1042.

Smith v. Cahoon (1931), 283 U. S. 553 (556-7); 51 Sup. Ct. 582; 75 L. Ed. 1264.

Foster Fountain Pen Co. v. Haydel (1928), 278 U. S. 1 (13); 49 Sup. Ct. 1; 73 L. Ed. 147.

Liggett Co. v. Baldridge (1928), 278 U. S. 105 (111); 49 Sup. Ct. 57; 73 L. Ed. 204.

Frost v. Corporation Commission (1929), 278 U. S. 515 (525); 49 Sup. Ct. 235; 73 L. Ed. 483.

Quaker City Cab Co. v. Mars (1928), 277 U. S. 389; 48 Sup. Ct. 553 (554); 72 L. Ed. 927.

6. The jurisdiction of the Supreme Court to review the decisions of the state courts; the question, whether or not, a federal question was raised below, and whether the decision below was properly based on a non-federal question, are all questions for the determination of the Supreme Court. The decision below does not preclude the Supreme Court from reviewing a case, and determining the questions thus presented, on the basis of the effect and operation of the law or act challenged, regardless of the determination of the state legislature, or the decision of the state court.

Kansas City So. Ry. Co. v. Albers Comm'n Co. (1912), 223 U. S. 575 (591-593); 32 Sup. Ct. 316; 56 L. Ed. 556.

Creswill v. Knights of Pythias (1912), 225 U. S. 246 (261); 32 Sup. Ct. 822; 56 L. Ed. 1074.

Davis v. Wechsler (1923), 263 U. S. 22 (24); 44 Sup. Ct. 13; 68 L. Ed. 143.

Ancient Egyptian Order v. Michaux (1929), 279 U. S. 737 (745); 49 Sup. Ct. 485; 73 L. Ed. 931.

Furnam v. Nicol (1869), 75 U. S. (8 Wall.) 44 (56); 19 L. Ed. 370.

Nutt v. Knut (1906), 200 U. S. 13; 26 Sup. Ct. 216; 50 L. Ed. 348.

St. Louis I. M. & S. Ry. Co. v. Starbird (1917), 243 U. S. 592 (598-9); 37 Sup. Ct. 462; 61 L. Ed. 917.

Truax v. Corriodan (1921), 257 U. S. 312 (324); 42 Sup. Ct. 124; 66 L. Ed. 254.

Standard Oil Co. v. Graves (1919), 249 U. S. 389 (394); 39 Sup. Ct. 320; 63 L. Ed. 662.

Amer. Ry. Ex. Co. v. Levee (1923), 263 U. S. 19 (21); 44 Sup. Ct. 11; 68 L. Ed. 140.

First Nat'l Bank v. Anderson (1926), 269 U. S. 341; 46 Sup. Ct. 135; 72 L. Ed. 95.

Stearns v. Minnesota (1900), 179 U. S. 223 (232); 21 Sup. Ct. 73; 45 L. Ed. 162.

Adams v. Russell (1913), 229 U. S. 353 (359); 33 Sup. Ct. 846; 57 L. Ed. 1224.

U. S. Glue Co. v. Town of Oak Creek (1918), 247 U. S. 321; 38 Sup. Ct. 499 (501); 62 L. Ed. 1135.

American Mfg. Co. v. City of St. Louis (1919), 250 U. S. 459 (462-3); 39 Sup. Ct. 522; 63 L. Ed. 1084.

Shaffer v. Carter (1920), 252 U. S. 37 (55); 40 Sup. Ct. 221; 64 L. Ed. 445.

Meyer v. Nebraska (1923), 262 U. S. 390 (400); 42 Sup. Ct. 625; 67 L. Ed. 1042.

Appleby v. City of New York (1926), 271 U. S. 364 (380); 46 Sup. Ct. 569; 70 L. Ed. 992.

Hanover Fire Ins. Co. v. Carr (1926), 272 U. S. 494 (511-12); 47 Sup. Ct. 179; 71 L. Ed. 372.

First Nat'l Bank v. City of Hartford (1927), 273 U. S. 548 (552-3); 47 Sup. Ct. 462; 71 L. Ed. 767.

7. The question of practical construction, that contemporaneous construction by the framers of the Constitution, and long acquiescence therein by Congress, and administrative officers, fixes the meaning of constitutional provisons:

Myers v. The United States (1926), 272 U. S. 52 (116); 47 Sup. Ct. 21; 71 L. Ed. 160.

colonial and historical background, see:

45 Harvard L. Rev. (Dec. 1931) 155